

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

UD447/2008

- claimant

MN406/2008

against

EMPLOYER

- respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. McAveety

Members: Mr W. Power
Mr P. McAleer

heard this claim at Cavan on 23rd February 2009 and 6th May 2009 and 6th November 2009

Representation:

Claimant: Ms. Fiona Murphy, John P. Redmond & Co., Solicitors,
Marshalsea Court, 22/23 Merchant's Quay, Dublin 8

Respondent: Mr. Ambrose Downey, IBEC, Mid West Regional Office,
Gardner House, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:

Respondent's case:

The Managing Director (MD) gave evidence that she asked the claimant to join the company in 2003. Their relationship was good for some time, except for one issue when she discovered that he didn't have a current driving licence at one time, which put the company at some risk.

On 20 November 2007 he was involved in a traffic accident and suffered some soft tissue injury. He got physiotherapy for his injury and was out sick for some time. The company referred him to a Consultant Occupational Specialist (Specialist) who declared him fit to return to work, but the claimant refused to accept this and stayed away from work.

The company decided to find out exactly what was going on and hired a Private Investigator (PI) to monitor the claimant's movements. They discovered that he was driving the company's van when

he stated that he was unable to drive. He also claimed that his GP had declared him unfit to return, when in fact he had not even attended the surgery that day.

They held two disciplinary investigation meetings with the claimant, but failing to elicit any worthwhile explanation for his behaviour, she felt that they had no option but to dismiss him because trust had broken down and he had been dishonest in his responses to the company. He did not pursue the appeals process, and they heard no more until informed by the claimant's solicitor of the Tribunal claim.

During cross-examination the MD stated that she had not issued the claimant with a warning when it became known that he didn't have a driver's licence, as she was trying to be fair. She gave him the benefit of the doubt. The claimant continued to drive for the company while his licence was arranged.

The claimant returned to work on 18 January 2008 and worked until 12 February 2008. On 12 February the claimant went on a call to Derry and phoned to say that he had exacerbated his injury. The claimant submitted a sick certificate for 12 to 28 February 2008.

MD was concerned that the claimant had phoned in sick and so sent the claimant to see a Consultant Occupational Specialist (Specialist) in Dublin on 19 February 2008. The Specialist reported that the claimant was fit for work and recommended that the claimant attend physiotherapy.

MD met the claimant on 25 February 2008 and he expressed his wish to return to work. MD disputed that the claimant said he was driving short distances and had cancelled a DOE test for the van as he wasn't driving. MD contended that the claimant could not have had a thorough medical exam when he went to his doctor (GP) surgery on 12 March 2008 having arrived at 11.07am and departed at 11.22am.

MD hired the PI as the claimant was ignoring the Specialist's report that he was fit to return to work and the claimant was not sending in his sick certificates on every week in compliance with the company's sick pay scheme or on time. The previous issue of the claimant's driver's licence was also in MD's mind.

The HR Manager (HRM) gave evidence. HRM always encouraged MD to document any conversations with employees and MD emailed HRM after conversations with the claimant as per this procedure. HRM organised the claimant's trip to Dublin to see the Specialist (the claimant travelled by taxi). HRM spoke to the claimant on his return from Dublin. The claimant disagreed with the Consultant that he should return to work and was going to remain on sick leave as per his GP. He accepted the suggestion of attending physiotherapy.

HRM and MD discussed the Specialist's report. HRM wrote to the claimant about the requirement for weekly sick certificates.

A decision to hire a Private Investigator (PI) had not been taken lightly. MD had relayed her concerns to HRM about inconsistencies regarding the claimant's absence and stating that he was driving short distances and then other times saying that he wasn't driving at all.

The claimant visited the company doctor in Limerick on 18 March 2008 prior to attending a meeting with MD and HRM. The company doctor found that the claimant was fit to return to work.

This was not a disciplinary meeting. MD told the claimant that she was concerned that the claimant wouldn't accept the Specialist's report. When the claimant said that he attended his doctor on 7 Mar 2008 to get a fit to work certificate she wouldn't issue one. MD told the claimant that she had reason to believe the claimant had not attended the doctor. The claimant agreed that he had made an appointment, but had not been able to attend.

MD also stated that she had evidence to show that the claimant was driving on the day that the claimant said he couldn't bring the company van for a DOE test, as he wasn't driving. MD outlined that she did not accept that the claimant could have had a full physical assessment when he attended his GP on 10 March for 10 minutes.

It was agreed that a disciplinary investigatory meeting would be held the following week and that the claimant could bring a representative with him. This meeting was similar to the previous meeting. The company did not dispute that the claimant had had an accident or that he had been injured. The issue was his conduct while on sick leave. The claimant apologised for lying about attending his GP. He said he had to collect his daughter and was unable to make the appointment. It was agreed to have a further meeting on 31 March 2008.

At the next meeting on 31 March 2008 HRM asked for mitigating factors but the claimant said there weren't any. The claimant was dismissed and advised of his right to appeal.

During cross-examination HRM agreed that the only problem the claimant had had previously was when he didn't have a driver's licence, but there was no disciplinary action taken against the claimant for that. HRM stated that this was not used as part of the reason to dismiss but just showed that when he lied about going to see his GP it was not the first time he was dishonest.

The Private Investigator (PI) gave evidence. MD initially contacted PI and then HRM forwarded details to him via email.

PI started his surveillance of the claimant on 5 March 2008 and observed him on the 7, 11, 12 March. The PI observed the claimant driving to various locations including the medical centre, crèche and supermarket. On 7 March MD informed the PI that the claimant should be attending his GP in the afternoon. The PI waited for the claimant to arrive, but there was no sign of the claimant. The PI went into the surgery at 4.45pm and was told that the claimant did not have an appointment. On 11 March the PI observed the claimant carrying two bags from the supermarket. On 12 March the PI observed the claimant attending the medical centre.

During cross-examination the PI stated that was contacted by MD sometime prior to the 28 February 2008 as he received the email from HRM on 28 February 2008.

The Occupational Specialist Consultant (Specialist) gave evidence that she examined the claimant on 18 February 2008. The claimant had soft tissue strain and some difficulty with neck movement. He reported some anxiety while driving the van and that the pain had worsened after a trip to Derry. The Specialist noted that the claimant's job required driving 600-700 miles per week and had to lift awkward loads. The Specialist recommended physiotherapy and that the claimant was fit to return to work. The Specialist had no recollection of the claimant disputing her recommendation or note of such a dispute. The report was forwarded to the company and to the claimant's GP.

During cross-examination the Specialist stated that she was aware that the claimant was on sick leave when he attended for examination.

Claimant's Case:

The claimant's general practitioner (GP) gave evidence that she produced two reports regarding the claimant. The first report stated that the claimant was unfit for work on 17 December 2007 and a further report subsequent to his dismissal. A colleague saw the claimant on 12 March 2008. The GP noted that the physiotherapist's note on file recommending that the claimant stay off work. The claimant was certified unfit to work at the time of his dismissal.

The claimant attended for examination every month and was provided with a certificate every two weeks. The claimant did not feel confident to drive and the GP was content to certify him unfit to work. The GP saw the Specialist's report (she didn't have it in February), after she saw the claimant, but contended that she had to make up her own mind as regards the claimant's fitness to work.

During cross-examination the GP stated that she took that claimant at face value when he said he didn't feel fit to work. She noted that he had difficulty with movement. The GP stated that she certified the claimant unfit to work, not unfit to drive, and assumed that he was driving to and from the surgery. The GP referred the claimant for physiotherapy at Cavan General Hospital, but was unaware if he had attended. The GP again advised the claimant to attend physiotherapy after his trip to Derry aggravated his injury.

The claimant attended the surgery on 20/11/07, 5/12/07, 13/12/07, 13/2/08, 12/3/08, 14/4/08. Dates hand inputted by GP.

The claimant commenced his employment with the respondent company in February 2003. He sold and serviced machines for the company covering the whole island of Ireland. The job involved lifting machines, sometimes with someone else and sometimes alone. One machine could weigh 75kgs and the claimant's toolbox was also a substantial weight. Often the claimant was unable to park directly outside the venue.

The claimant was embarrassed that he had let his driver's licence expire. Once he knew he sat his test within five or six weeks and passed. The claimant was driving home from the company in Limerick when his van skidded on oil and he crashed into a wall. The following day the claimant had severe neck and shoulder pain and visited his GP. The claimant was on sick leave and then on holiday leave to take a pre accident arranged holiday to New Zealand. The claimant had one session of physiotherapy prior to his holidays, which he found very painful.

The claimant returned to work in January, after his holiday, as he felt up to it and was aware that the company was under pressure with only one sales and service person in the country. On 11 February 2008 the claimant travelled to Derry on a call, which aggravated his shoulder and neck injury. He was certified sick for two weeks by his GP.

The claimant attended a Specialist in Dublin on 18 February 2008. The claimant explained his role and how much driving he did. He showed the Specialist where the initial injury was and where it had flared up. The Specialist's opinion was that rest wouldn't heal his injury and that he required physiotherapy. The company was to pay for the physiotherapy but they didn't. The claimant felt that the Specialist was dismissive of him.

The claimant spoke to HRM on the way home and explained that he felt that the Specialist was

dismissive of the pain the claimant was in. He didn't feel safe driving the van or lifting weights. The claimant attended a physiotherapist on 21 February 2008 who told him to rest, which he communicated to MD.

The claimant met MD in Cavan on 25 February 2008 and explained how he felt about driving and lifting. He told MD that he really wanted to get back to work. The claimant felt under pressure from MD to return to work. The claimant agreed to take calls over the phone.

The claimant attended physiotherapy and acupuncture on 28 February 2008. He was told to drive short distances, which he relayed to MD. He hadn't been driving previous to this and had been getting lifts. The claimant booked the company van in for a DOE test for the 5 March but had to rearrange for the 11 March as he had a physiotherapy appointment. The claimant arranged to visit clients the following week.

The claimant lied about attending his GP on 7 March 2008. He was under pressure to collect his daughter and felt that if he said he hadn't been to the GP MD would be annoyed.

On 12 March 2008 the claimant attended physiotherapy and then went to the medical centre where he saw a different GP than normal. She gave the claimant a certificate for two weeks back dated to the 5 March 2008 in order to comply with the sick pay scheme.

The claimant attended the company's GP in Limerick for a physical exam. The GP said that it was normal to experience pain for up to six months after an accident. He was not pain free as the GP's report stated. The physical examination last five or six minutes and was quite painful. The rest of the time was spent discussing his health and wellbeing.

The claimant then went to meet MD and HRM. The claimant said that he was ready to return to work. MD then put forward the PI's information about his movements. The claimant felt ambushed and wasn't given an opportunity to explain his actions. He felt that his privacy was invaded and was shocked that they didn't believe that he was in pain. He felt MD's attitude had changed towards him and she was very abrupt with him.

He attended another meeting on March 25th 2008 with MD and HRM and again told them he was still in pain. The same questions were put to him as at the last meeting. MD told him that he had lied to her and there was no longer any trust between the respondent company and himself. He told the Tribunal that he was aware that he had lied about attending his GP but had explained the circumstances. There had never been a problem with his work in the past.

On March 27th 2008 HRM invited him to a meeting on March 31st 2008. He was informed that the meeting was *"to discuss the outcome of the disciplinary investigative meeting. It should be noted that at this meeting disciplinary action may be taken up to and including dismissal."* At this meeting the HRM and MD again raised the serious issues of his on-going absence from work and his conduct while on sick leave. He was informed after their careful consideration to the facts and his responses there was a serious breakdown in trust and confidence beyond repair and in the circumstances they had no alternative but to dismiss him.

The claimant gave evidence of loss. He stated that he would have to contact his GP to verify to the Tribunal when he was fit to return to work.

On cross-examination he again stated that he would have to lift machinery up to 75kg in weight.

He agreed the respondent had purchased a special trolley to carry machinery up staircases but some premises were too small and awkward to use it. In respect of his expired driving licence, he said that he felt embarrassed about the incident. He explained that he had travelled on his pre-booked trip to New Zealand whilst on sick leave but had been informed by his GP that he could take painkillers if needed.

He said that he had kept in constant contact with MD and HRM and they were quite aware he was doing some driving to his GP and physiotherapy whilst on sick leave. MD was aware he wanted to return to work.

Determination:

The Tribunal have carefully considered all the evidence adduced over a number of days by both parties in this case. The claimant was dismissed during a period of sick leave after an accident during working hours. He adhered to the wishes of the respondent company submitting medical certificates and attending the company doctor. The Tribunal note that the respondent initiated a surveillance process on the claimant around the 28 February 2008 whilst at the same time, they were expecting him to bring the company van to a DOE test on the 5 March 2008. The Tribunal also note that the claimant did not exercise his right of appeal against the decision to dismiss him.

The Tribunal find the respondent company in dismissing the claimant, did not carry it out procedurally fair. Accordingly, the Tribunal finds the claimant was unfairly dismissed and awards the sum of €15,000 under the Unfair Dismissals Acts, 1977 to 2007.

The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2007 is allowed and the appellant is awarded € 3,587.76 as compensation for four week's notice.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)